IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 161

DORA SUROWITZ, Individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION, *Petitioner*,

vs.

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHHOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON HILTON and HILTON CREDIT CORPORATION, a corporation, *Respondents*.

BRIEF FOR RESPONDENT HILTON HOTELS CORPORATION.

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MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT.

We respectfully submit that the decision below should be affirmed.

The "sworn" complaint accuses the corporate management of gross fraud and self-dealing; such accusations, if irresponsibly lodged, wrongfully tarnish the corporation's image and impair its standing with the public and the business community. Mrs. Surowitz' deposition reveals beyond cavil that she has no knowledge, information nor belief concerning *any* of the accusatory allegations of the complaint. Moreover, she has no awareness of even the simplest and most fundamental elements that any interested and bona fide plaintiff (no matter how unsophisticated)

would have, *i.e.*, whom she was suing, what basic wrong she was charging, and the relief she was seeking.[1]

Mrs. Surowitz' son-in-law, one Irving Brilliant, instigated and apparently contrived the suit, for the record shows:

First, Brilliant told Mrs. Surowitz that *he* "would like to take action" against the corporation (R. 110);

Second, Brilliant retained the lawyers (R. 122);

Third, Brilliant arranged the financing of the action (R. 120-21, 123);

Fourth, Brilliant "told" Mrs. Surowitz to execute the verification (R. 96);

Fifth, Brilliant "was the one who knew all about it" and the lawyers dealt solely with Brilliant (R. 107, 120-24);

Sixth, Brilliant could have filed the suit himself (or later joined as plaintiff) since he was a legal owner of Hilton stock, but for some undisclosed reason he does not care to be a party to the suit (R. 120-24, 107);

Seventh, Mrs. Surowitz has no information nor cognizance of any of the complaint's accusations and has no reason whatsoever to question the honesty or integrity of any of the defendants (R. 107, 105).[2]

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1. The complaint, although needlessly voluminous, accuses the individual defendants of the simple fraud of selling their private stock holdings to the Hilton Hotels Corporation at an artificially inflated price (R. 1-64).

2. Brilliant's affidavit states that he acts as an investment advisor to various persons and firms (R. 120). The affidavit also states that Brilliant has volunteered financial advice to his mother-in-law, Mrs. Surowitz, for several years and that she relies heavily upon his advice (R. 121-22). Mrs. Surowitz, when asked at her deposition what Brilliant's business or occupation was, replied "I don't know what he is doing." (R. 95.)

SUMMARY OF ARGUMENT.

The record plainly reveals, and both of the lower courts found, that Mrs. Surowitz was a "plaintiff" in name only; she in fact simply loaned her name and her "oath" to Brilliant. We do not believe that a decision here condoning and upholding a complaint so sworn can be reconciled with either Rule 23(b), or indeed, with the basic concepts of our adversary system of justice. Nor do we believe that sanctioning such a meaningless verification would be compatible with the interests of this or any corporation and the class of all shareholders upon whose behalf derivative suits are brought. Quite the contrary, allowing this action to proceed upon such a record would only resurrect the many and intolerable abuses that Rule 23(b) was specifically enacted to correct.

Petitioner's counsel could have easily eliminated all controversy concerning the false verification by amendment, substitution or otherwise; the record shows that the trial court expressly and repeatedly afforded every opportunity to do so. In the face of counsel's persistent refusal of all such opportunities, dismissal below was plainly warranted.

ARGUMENT.

I. The Complaint Was Properly Dismissed Because of the Plaintiff's Complete Lack of Knowledge and Control of the Suit.

The petitioner's absolutely meaningless "verification" of the complaint's accusatory allegations plainly violated Rule 23(b); a claim to the contrary is tantamount to rendering the verification requirement of the Rule an idle gesture. The petitioner's brief candidly admits, as it must, that "The grammar of the Rule—both as originally written and as it now is embodied in Rule 23(b)—indicates that the *entire complaint* in a derivative suit is to be verified."[3] (Petr. Br. p. 30; emphasis added.)

Petitioner's brief, however, urges this Court to construe Rule 23(b) contrary to its plain language; petitioner contends that public policy considerations are best served by restricting the verification requirement to the formal and innocuous allegations concerning plaintiff's stock ownership, non-collusiveness and prior demand for redress (Petr. Br. pp. 22-34). Apart from the fact that the peti-

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3. Rule 23 (b) provides in pertinent part:
"In an action brought to enforce a secondary right on the part of one or more shareholders . . . the complaint *shall* be verified by oath *and* shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." (Emphasis added.)

tioner's argument is directly opposed to the history and judicial gloss of Rule 23(b) (see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541), we submit that petitioner's policy plaints are in truth nothing more than a request for redrafting of Rule 23(b) in this proceeding. In the past when this Court has been asked to amend a Federal Rule by judicial declaration the request has been specifically rejected.[4] We believe the Court should do likewise here, particularly when the alleged necessity for petitioner's request (*i.e.*, that although petitioner verified, she left all cognizanze and control of the suit to an intermediary, Brilliant) arises because of conduct condemned by Canon 35 of the Canons of Professional Ethics.[5] We submit that if circumstances ever arise to warrant redrafting and revising Rule 23(b), it would not be upon a record such as here.

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4. See, *e.g.*, *United States* v. *Robinson*, 361 U. S. 220, 229, where the Court declared:

> "That powerful policy arguments may be made both for and against greater flexibility [of Rule 45(b)] is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision."

See also *United States* v. *Isthmian S. S. Co.*, 359 U. S. 314.

5. Canon 35 provides:

> "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. *He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.* A lawyer's relation to his client should be personal, and the responsibility should be direct to the client." (Emphasis added.)

See A. B. A. Opinions of Committee on Professional Ethics and Grievances, Opinions Nos. 32, 98, 237 (1957).

Petitioner also seeks a reversal on the ground that the decision below penalizes her because she is poorly educated and has a limited grasp of corporate transactions; she urges that more and more unsophisticated persons are becoming shareholders and that the decision below will prevent their maintaining derivative suits (Petr. Br. pp. 39-49). The courts below, however, did not dismiss the suit because of petitioner's lack of sophistication or formal schooling. Rather, the Court of Appeals declared *only* that a plaintiff swearing to a complaint under Rule 23(b) should have *minimal* "knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges." (R. 239.)

Such a criterion is no more stringent than the rudimentary awareness that is required to sign a will, a promissory note, or a contract or to do any other act incidental to the ordinary and day-by-day affairs of life. (See *Kendall* v. *Ewert*, 259 U. S. 139; *Stockmeyer* v. *Tobin*, 139 U. S. 176; *Turley* v. *Turley*, 374 Ill. 571, 30 N. E. 2d 64; *Hillman* v. *Huitt*, 249 Mich. 1, 227 N. W. 729; *American Law of Property*, Vol. III, § 12.69 (1952).) Clearly, nothing less than that kind of minimal knowledge can assure that derivative plaintiffs have some semblance of personal relationship to the suits they swear are true and bring as fiduciaries. We submit that condoning a derivative action sworn by one who is totally uninformed, indifferent and unheeding would be to eliminate the necessity of actual plaintiffs and allow derivative suits to be filed and managed solely by lawyers or brokers.

Indeed, this Court has itself pointed out, in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, that the shareholder's derivative action has a long and inglorious history of being used by lawyers or "strike suitors" for nefarious and ulterior purposes detrimental to the rights

of the corporation and its shareholders; Rule 23 (b) was expressly designed to curb such abuses. The Court declared in *Cohen* (337 U. S. at 548-49):

> "[Derivative] suits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value . . . These litigations were aptly characterized in professional slang as 'strike suits.' . . . [A] stockholder who brings suit on a cause of action derived from the corporation *assumes a position, not technically as a trustee perhaps, but one of a fiduciary character.* . . . The interests of all in the redress of the wrongs are taken into his hands, *dependent upon his diligence, wisdom and integrity.*" (Emphasis added.)

See, to the same effect, *Pioche Mines Consolidated, Inc.* v. *Dolman*, 333 F. 2d 257, 265 (9th Cir.); *Gottesman* v. *General Motors Corp.*, 28 F. R. D. 325, 326 (S. D. N. Y.); Wood, *Survey and Report Regarding Stockholders' Derivative Suits*, pp. 58-61 (1944). Accordingly, enforcement of Rule 23(b) as it is written protects *both* the unsophisticated shareholder *and* his corporation from becoming the victims of the unscrupulous who prosecute (or settle) derivative suits solely according to the dictates of self-enrichment. And at the same time, the Rule plainly does not discourage or inhibit the bringing of meritorious derivative suits.

We freely concede that in areas where unwarranted and unjust barriers have arisen to thwart the filing of a lawsuit, the traditional relationship of the plaintiff to his suit has been somewhat relaxed (*i.e.*, in civil rights litigation and railroad personal injury suits.) See *NAACP* v. *Button*, 371 U. S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1. However, the exact opposite kind of abuse has occurred in the area of shareholders' derivative suits and opposite considerations apply. The derivative suit has a long history of being recklessly lodged in the names of paper plaintiffs solely for the en-

richment of lawyers and their lay confederates; this sordid background has prompted the imposition of a number of special safeguards (including Rule 23 itself) to prevent misuse of the derivative action.[6] See *Cohen* v. *Beneficial Industrial Loan Corp., supra; Home Fire Ins. Co.* v. *Barber,* 67 Neb. 604, 93 N. W. 1024; 4 Thompson, *Corporations,* Sec. 4571 (1895). Thus, the reading of Rule 23(b) in its plain terms (all that the lower courts have done here) allows free access to the courts in derivative actions without regressing to the era when the suit was an instrument of intolerable abuse and exploitation.

We submit that the petitioner has not justified allowing her to proceed with what is in fact no verification; nor has petitioner given any valid reason for rewriting Rule 23(b). As construed by the courts below, the verification requirement is met by a plaintiff's minimal awareness of what basic wrongdoing is alleged and who committed it. No easier nor fairer standard is conceivable before one should be allowed to sue in a fiduciary capacity on behalf of all fellow shareholders.

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6. "The fact that the great preponderance of stockholder's derivative actions are unfounded and the wholesale charges of wrong-doing commonly made are seldom proven is confirmed and reflected in the changed attitude of the courts. . . . [D]ecisions [reflecting this attitude] are, by ordinary standards, strict, and come close to the line of requiring the pleading of evidence. *It is, however, only the natural result that the flood of unfounded litigation and irresponsible charges of wrongdoing in these cases have compelled recourse to extra rigid standards of pleading.*" Wood, *Survey and Report Regarding Stockholders' Derivative Suits* (1944), pp. 58, 60-61 (emphasis added).

II. Dismissal of the Action Was Appropriate Because of the Failure to Amend or Substitute.

The petitioner's brief seeks the impression that the District Court abruptly and summarily dismissed the complaint upon discovery of the false verification, without affording any opportunity to cure the defect (Petr. Br. pp. 4, 15-16, 50-53). But the record totally repels this contention. Prior to the final order of dismissal the trial judge gave the petitioner's attorneys repeated and painstaking invitations to do or file anything they considered appropriate to save the complaint.

When the motion to dismiss was first filed the trial court allowed petitioner fifteen days to file "such documents as her counsel might think appropriate in opposition to the motion." (R. 172.) At the oral argument upon the motion to dismiss, the trial judge made pointed and repeated references to the ease of correcting the defect:

> "[I]t seems to me that the preferable way to have gotten this complaint on file, if they wanted this woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff." (R. 175-76.)
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> "[I]t is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? . . . It seems to me that would have been the simple way to do the thing properly." (R. 185.)

Petitioner's counsel, however, flatly refused all such suggestions and elected to stand upon the original veri-

fication. Several possible alternatives, or a combination of them, were manifestly available:

(1) Brilliant (a legal owner of Hilton stock and "the one who knew all about it") could have joined or substituted as verifying plaintiff;

(2) Brilliant could have tendered a substitute verification;

(3) Brilliant's wife or another member of his family who owned Hilton stock could have joined or substituted as verifying plaintiff;

(4) Any other Hilton stockholder could have joined or substituted as verifying plaintiff.

Although petitioner's brief urges that dismissal of the complaint was an unduly severe sanction to impose for the violation of Rule 23(b), the brief does not suggest any other alternative that the trial court could have followed (other than adopting the view of petitioner's counsel that *no* violation of Rule 23(b) had in fact occurred) (Petr. Br. pp. 50-53). Indeed, all of the alternatives other than dismissal were solely within the hands of petitioner's counsel (and Brilliant); instead of easily eliminating any further controversy over whether plaintiff's false verification violated Rule 23(b), counsel dogmatically insisted upon an immediate ruling on the question by the trial court. Having received it, they are in no position to complain now that the sanction imposed by the trial court was too onerous, particularly when they did not suggest any milder form of remedy either before or after the judgment. See *Johnson* v. *Brandon Corp.*, 183 F. 2d 444 (4th Cir.); *Package Machinery Co.* v. *Hayssen Mfg. Co.*, 266 F. 2d 56 (7th Cir.).

Conclusion.

For the foregoing reasons we submit that the decision below should be affirmed.

Respectfully submitted,

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